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Supreme Court, U.S.
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In the
Supreme Court of the United States

STATE OF NEW MEXICO,

Petitioner,

v.

HON. JAY W. FORBES, CHIEF JUDGE,
DISTRICT COURT OF NEW MEXICO,
5TH JUDICIAL DISTRICT,

Respondent,

and

RALPH RODNEY EARNEST,

Real Party in Interest.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW MEXICO SUPREME COURT

BRIEF IN OPPOSITION FOR REAL PARTY IN INTEREST, RALPH RODNEY EARNEST

J. THOMAS SULLIVAN
COUNSEL OF RECORD FOR
REAL PARTY IN INTEREST
MEMBER, BAR OF THE
SUPREME COURT
P.O. BOX 17007
LITTLE ROCK, AR. 72222
501/324-9940

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ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The New Mexico Supreme Court relied on *Crawford v. Washington*, 541 U.S. 36 (2004), in reviewing Real Party in Interest Earnest's state habeas corpus challenge to his conviction obtained as a result of the admission of the inculpatory custodial statement given by a non-testifying accomplice, Boeglin, at trial. *State v. Forbes and Earnest*, 119 P.3d 144, 148-49 (N.M. 2005). The state supreme court originally reversed his conviction in *State v. Earnest*, 703 P.2d 872, 874-75 (N.M. 1985) [*Earnest* I][1], applying this Court's decision in *Douglas v. Alabama*, 380 U.S. 415 (1965). In reversing, the court held:

> . . . Boeglin's prior statement made to police officers shortly after his arrest was not made during the course of any judicial proceeding and defendant was in no way afforded an opportunity to cross-examine Boeglin. We therefore determine that admission of Boeglin's prior statement was highly prejudicial, violated defendant's confrontation rights, and deprived defendant of meaningful cross-examination.

703 P.2d at 876.

Following the reversal, this Court granted the State's petition for writ of certiorari and after argument, vacated the judgment and remanded for reconsideration in light of the Court's decision in *Lee v. Illinois*, 476 U.S. 530 (1986). *New Mexico v. Earnest*, 477 U.S. 848 (1986) [*Earnest* II]. As

[1] Earnest relies on the same designations used by the New Mexico Supreme Court in its opinion. *See State v. Forbes and Earnest*, 119 P.3d at 145.

the state court observed, the remand occurred more than a year after the decision rendered in Earnest's direct appeal. 119 P.3d at 146. On remand, the state supreme court, persuaded by the concurring opinion of then-Justice Rehnquist, joined by the Chief Justice and Justices Powell and O'Connor, 477 U.S. at 649, concluded that Boeglin's uncrossed statement was reliable[2] as a statement against interest and affirmed Earnest's conviction. *State v. Earnest*, 744 P.2d 539, 539-40 (N.M. 1987) (*Earnest* III).

Following affirmance, this Court denied Earnest's petition for certiorari, *Earnest v. New Mexico*, 484 U.S. 924 (1987), and his subsequent state and federal habeas corpus applications were also rejected. *Earnest v. Dorsey*, 87 F.2d 1123, 1130-33 (10th Cir. 1996), *cert. denied*, 519 U.S. 1016 (1996).

Nearly twenty years later the case returns to this Court.[3]

---

[2] Boeglin was later tried and convicted despite his testimony that police had suppressed evidence supporting his defense of duress in participating in the murder of the victim, Eastman. *State v. Boeglin*, 731 P.2d 943, 949-50 (N.M. 1987). The State relies on the court's opinion in *Boeglin* in its recitation of facts, *see* Petition for Writ of Certiorari, at 2, but offers no explanation for the dubious proposition that Boeglin's statement resulting in Earnest's conviction could be considered sufficiently reliable to continue to warrant Earnest's incarceration while jurors considering Boeglin's credibility at his own trial rejected his explanation of the events surrounding Eastman's murder, instead convicting him of capital murder.

[3] *See* J. Thomas Sullivan, *Twice Grilled*, 5 J. App. Prac. & Process, 151, 153-55 (2003) (noting vote in *Lilly v. Virginia*, 527 U.S. 116 (1999) supported New Mexico Supreme Court disposition in *Earnest* I).

I.

The decision of the New Mexico Supreme Court rests on an "adequate and independent" state law ground precluding review on certiorari by this Court.

The State relies on the Supremacy Clause of the United States Constitution in arguing that the New Mexico courts are barred from affording Earnest relief based upon their review of this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). Yet, the State offers no authority for the proposition that New Mexico is barred from reconsidering Earnest's conviction in light of *Crawford*. The state courts correctly understand *Crawford* to be an affirmation of the continuing viability of *Douglas v. Alabama*, 380 U.S. 415 (1965), the controlling decision of this Court interpreting the right to confrontation in the context of admission of uncrossed, custodial, accomplice statements at the time of Earnest's trial and direct appeal to the New Mexico Supreme Court. *Crawford*, at 57.

The decision of the New Mexico Supreme Court rests on adequate and independent state law grounds that preclude review on federal constitutional grounds by writ of certiorari. *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983). The court below concluded that *Crawford* did not announce a "new rule" of constitutional criminal procedure, but instead, that the "result was 'dictated by precedent existing at the time" it decided

Earnest's case on the initial direct appeal, citing *Teague v. Lane*, 489 U.S. 288, 301 (1989). Consequently, the court concluded that Earnest was entitled to benefit from a retroactive application of the principle affirmed in *Crawford* precisely because that principle governed the trial and direct appeal of his case prior to this Court's action in *Earnest* II vacating the judgment reversing his conviction. 119 P.3d at 147.

In rejecting the State's argument that *Teague* bars retroactive application of the *Crawford* principle in reviewing Earnest's conviction, the state court noted the relevance of *Teague* for retroactivity analysis in its earlier opinion in *State v. Mascarenas*, 4 P.3d 1221, 1228 (N.M. 2000). There, the state supreme court distinguished between the announcement of a "new rule" and a "clarification" of an existing rule. *Id.* at 1229. But, more importantly, the *Mascarenas* court also observed that it had traditionally followed the *Linkletter v. Walker*, 381 U.S. 618 (1965) retroactivity test subsequently rejected by this Court in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

New Mexico has consistently applied the *Linkletter* approach to retroactivity instead of adopting this Court's approach in *Griffith* and *Teague*. *See Santillanes v. State*, 849 P.2d 358, 367-68 (N.M. 1993) (relying on courts' inherent power to give their rulings prospective or retroactive

application); *Jackson v. State,* 925 P.2d 1195 (N.M. 1996) (emphasizing the case-by-case nature of the prospective/retroactive inquiry and again citing *Linkletter*); and *State v. Kirby,* 930 P.2d 144 (N.M. 1996) (applying holding in *State v. Yarborough,* 930 P.2d 131 (N.M. 1996) retroactively).

In *Santillanes*, the state supreme court characterized its approach to retroactivity:

> It is within the inherent power of this Court to give its decisions prospective or retroactive application without offending constitutional principles.

849 P.2d at 366. In *Mascarenas*, the court noted its continuing fidelity to the flexible approach to retroactivity as a matter of state law:

> In the context of criminal cases, [State v.] *Ulibarri* [994 P.2d 1164 (N.M. App. 1999) *aff'd* 997 P.2d 818 (N.M. 2000) appears to continue New Mexico's departure from United States Supreme Court precedent on the issue of retroactivity by relying on the criteria set forth in *Linkletter* and echoed by *Santillanes. See also, Jackson v. State,* 1996- NMSC-054, ¶ 6, 122 N.M. 433, 925 P.2d 1195 (citing with approval *Santillanes'* and *Linkletter*'s case-by-case determination of prospective or retroactive application of new rules); *see also Beavers v. Johnson Controls World Servs.,* 118 N.M. 391, 393, 881 P.2d 1376, 1378 (1994) (expressly declining to follow the United States Supreme Court's rule of universal retroactivity in civil cases announced in *Harper v. Virginia Dep't of Taxation,* 509 U.S. 86, 113, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993)). We note that our discussion of the issue of retroactive or prospective application of new rules is limited only to an explanation of why it is inapplicable to this case).

4 P.3d at 1228, n.5.

New Mexico applies a far broader doctrine of retroactivity in civil cases than followed by this Court in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993). *Beavers v. Johnson Controls World Services*, 881 P.2d 1376, 1383 (N.M. 1994) (applying a presumption of retroactivity in civil cases). Presumably, if state conformity to federal retroactivity principles is compelled by the Supremacy Clause, as the State here argues, then this principle would seemingly apply to require all jurisdictions to follow *Harper* as a matter of federal constitutional command.

But Earnest reads *Griffith* and *Teague* only to require retroactive application of "new rules" of federal constitutional procedure to benefit criminal defendants in certain situations. Thus, when a defendant preserves a claim still pending in the direct appeal process when the Court articulates a "new rule" that would require a favorable disposition in this or lower courts, *Griffith* affords that defendant the benefit of the "new rule." 479 U.S. at 323. Otherwise, *Teague* limits the requirement for state application of a new rule except when the rule is expressly made retroactive by this Court.

Neither *Griffith* nor *Teague* addresses the retroactivity doctrine claimed by the State here as dictated by the Supremacy Clause—that state courts are constitutionally prohibited from applying the decisions of this Court retroactively as a matter of state policy. In fact, flexibility in

retroactivity policy may serve a legitimate policy. In *Jackson v. State*, 925 P.2d 1195 (N.M. 1996), the court quoted with approval the following language from the concurring opinion in *Commonwealth v. Harper*, 516 A.2d 319, 323-24 (Pa. 1986):

> Generally, where the purpose of a new constitutional doctrine is to cure a defect in the criminal procedure which impairs the truth finding function, and thus raises doubt as to the validity of the guilty verdict, the rule will be given full retroactive effect.

Here, of course, the admission of the testimonial statement made by a non-testifying accomplice and, thus, not subjected to cross-examination, implicates the very concern for validity of the guilty verdict underlying the promise of confrontation, as recognized in *Crawford*.

Because New Mexico has applied a broader policy of retroactivity in both civil and criminal contexts than this Court, the State can prevail only if the Supremacy Clause bars a state from articulating a policy providing for retroactive application of this Court's decisions even if deemed essential to furthering a legitimate state policy. Here, the state court supreme court has expressly predicated its determination not on any mechanistic formula, but on its interest in promoting justice. The court concluded:

> Because Earnest did not have the opportunity to cross-examine Boeglin, the tape recording and transcript of his statement were inadmissible under our reading of United States Supreme Court precedent that existed at the time of *Earnest I,* which *Crawford* clarifies has always been a correct interpretation of the law. Granting

> Earnest a new trial is consistent with our responsibility "to do justice to each litigant on the merits of his own case." *Desist v. United States*, 394 U.S. 244, 259, 89 S.Ct. 1048, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting). Our decision is limited to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has now been vindicated, which entitles him now to the same new trial he should have received back then. Accordingly, we affirm the district court, lift the stay, and remand for execution of the Writ of Habeas Corpus, affording the State the opportunity to retry Earnest.

119 P.3d at 148-49.

The decision of the lower court rests on application of state retroactivity doctrine. In the absence of any authority for the proposition that the Supremacy Clause precludes the states from applying more flexible approaches to retroactivity than that dictated by *Griffith* and *Teague* for the benefit of individual criminal defendants, the state court's ruling rests on an adequate and independent state law ground precluding review by this Court on certiorari.

II.

The State's petition for writ of certiorari should be denied because the State fails to satisfy the requirement for issuance of the writ that the decision of the New Mexico Supreme Court is contrary to a decision of this Court.

The State fails to advance any authority for the proposition that New Mexico is barred by the Supremacy Clause from applying a doctrine of retroactivity different from that articulated in the decisions of this Court. Even assuming that the decision of the New Mexico Supreme Court--which relies on prior decisions in which federal constitutional retroactivity principles have been discussed--does not rest on an adequate and independent state law ground, the State's reliance on *Teague v. Lane*, 489 U.S. 288 (1989), is misplaced.

Teague addressed constitutional retroactivity doctrine in response to the need to rationalize the Court's approach to retroactivity determinations in order to maximize fairness and uniformity while achieving reasonable expectations of finality, particularly in state criminal prosecutions. 489 U.S. at 309-310. The approach adopted in *Teague* and *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987), essentially ensures retroactivity of new rules only for those cases in which similar preserved claims of error are pending in the direct appeal upon the announcement of a new rule or for new rules that fit within one two exceptions to the general principle of prospective-only

application of new rules. 489 U.S. at 310-15. *Teague* also recognizes that rules dictated by prior decisions are not "new" in this sense and thus, do not fall within the general non-retroactivity approach to application of new rules. *Id.* at 301.

The thrust of the State's argument is that certiorari is appropriate because the New Mexico Supreme Court is required to apply the *Teague* retroactivity doctrine in the reviewing challenges to state convictions. But the State's analysis actually rests on the question of whether *Crawford* announces a new rule. Regardless of whether the New Mexico Supreme Court correctly concluded that *Crawford* supports Earnest's argument based on the law in effect at the time of his trial and original direct appeal--even if the court below erred in this regard--the State offers no support from *Teague* or other decisions of this Court for its argument that the Supremacy Clause bars New Mexico from essentially applying *Crawford* retroactively.

Similarly, the State's reliance on *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997) fails to support its argument that the Supremacy Clause commands New Mexico not to afford a state court defendant the benefit of an arguably "new rule" announced by this Court. There, the Court simply applied the test for determining whether a rule is "new" and concluded that

the rule of *Espinosa v. Florida*, 505 U.S. 1079 (1992), was not dictated by precedent. 520 U.S. at 528.

The State also relies on the Court's analysis in *Butler v. McKellar*, 494 U.S. 407, 412 (1990), where, the Court reiterated the *Teague* retroactivity formula in concluding that a "new" rule would not be applied retroactively. But the Court also elaborated on the underlying concerns supporting the limitations on retroactivity imposed in *Teague*:

> *Teague* further observed:
>
> > [I]n many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of [state] criminal prosecutions ... for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac*, [456 U.S. 107, 128, n. 33, 102 S.Ct. 1558, 1572, n. 33, 71 L.Ed.2d 783 (1982),] '[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.' ... See also *Brown v. Allen*, 344 U.S. [443], 534, 73 S.Ct. 397, 423, 97 L.Ed. 469 [(1953)] (Jackson, J., concurring in result) (state courts cannot 'anticipate, and so comply with, this Court's due process requirements or ascertain any standards to which this Court will adhere in prescribing them')." *Teague, supra*, at 310, 109 S.Ct., at 1075 (plurality opinion) (emphasis in original; some internal citations omitted).
>
> The "new rule" principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.

494 U.S. at 413-14.

The concern with finality that underscores the *Teague* rationale is designed to protect states from virtually unlimited, continuing exposure to the re-litigation of criminal cases that would be necessitated by universal retroactive application of "new" rules. But in the instant case, the state supreme court has implicitly concluded that even the consideration of finality does not warrant denial of state habeas relief.

The State concludes its petition pleading: "Finality is all Petitioner seeks here." [Petition for Writ of Certiorari, at 17]. But the state supreme court focused on a different concern:

> Granting Earnest a new trial is consistent with our responsibility "to do justice to each litigant on the merits of his own case." *Desist v. United States*, 394 U.S. 244, 259, 89 S.Ct. 1048, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting). Our decision is limited to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has now been vindicated, which entitles him now to the same new trial he should have received back then. Accordingly, we affirm the district court, lift the stay, and remand for execution of the Writ of Habeas Corpus, affording the State the opportunity to retry Earnest.

119 P.3d 148-49.

The State demonstrates no good reason why a jurisdiction may not extend the benefits of a "new" rule to those state court defendants as a matter of fairness. Here, the New Mexico Supreme Court has concluded that the interests of justice dominate the concern for finality. None of the decisions of this Court relied upon by the State in its petition, *Teague*,

Lambrix v. Singletary, *Butler v. McKellar*, nor *Schiro v. Summerlin*, 542 U.S. 348, 352-53 (2004), in any way limits a state court in the fashion argued by Petitioner here pursuant to the Supremacy Clause.

It would be perverse to force upon the state courts a doctrine that reflects policies designed to protect their own interests when the court of last resort has eschewed that protection. Moreover, since state habeas corpus is not mandated by the Constitution, *e.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (no constitutional right to counsel in state post-conviction proceedings); *Bounds v. Smith*, 430 U.S. 817, 835 (1977), Burger, C.J., dissenting (arguing no constitutional right to state post-conviction process), the forced application of a federal standard for ensuring fairness while advancing federalism would suggest a certain irrationality in the administration of the criminal justice system. It certainly is not dictated by either the text or tradition of the Supremacy Clause.

III.

The State's petition for writ of certiorari should be denied because the State fails to demonstrate a conflict existing between the decision of the New Mexico Supreme Court and other state courts of last resort or United States court of appeals warranting the exercise of this Court's jurisdiction.

Earnest recognizes that the State is able to contrast the decision below from decisions of other courts holding that *Crawford* both announces a "new" rule of constitutional criminal procedure and that the rule does not fit within either of the *Teague* exceptions to the general policy rejecting retroactive application of new rules. [Petition for Writ of Certiorari, at 8-9]. However, in framing the question presented, the State has elected to argue only that this Court should assert jurisdiction because the disposition in *State v. Forbes and Earnest* conflicts with the Tenth Circuit's holding in *Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. 2004).

Interestingly, in *Brown*, the Tenth Circuit concluded that the Wyoming Supreme Court had upheld a conviction obtained through admission of a non-testifying co-defendant's confession to police and in doing so "acted contrary to clearly established federal law." 381 F.3d at 1225. Nevertheless, the court denied habeas, finding no Confrontation Clause violation and holding that *Crawford* could not be applied retroactively because it announced a "new" rule. *Id.* at 1225-28. Instead, it observed that prior to this Court's disposition in *Lilly v. Virginia*, 527 U.S.

116 (1999), and the positions taken by the *Lilly* plurality and Justice Scalia, concurring, *id.* at 143, no Confrontation Clause violation was demonstrated by reliance on corroborating evidence to support an inference that the non-testifying accomplice's statement was admissible as a declaration against interest. 381 F.3d at 1227, n. 6.

The State's reliance on *Brown v. Uphoff* as the basis for conflicting opinions arguably supporting review by certiorari pursuant to Rule 10(b) of the Rules of the Supreme Court is not persuasive for two different reasons.

First, *Brown* arises in the context of a federal habeas proceeding in which the Tenth Circuit applied a deferential approach, even though the claim was analyzed under pre-AEDPA standards and the court engaged in a *de novo* review of the reliability of the declarant's statement. 381 F.3d at 1225. Of course, AEDPA mandated-deference may require a federal habeas court to defer to a state court decision relying on the relaxed standard for confrontation subsequently rejected in *Crawford.*

Earnest's claim arises in a different context, however, because the state supreme court was not confined by deference to any other court's disposition. Rather, the New Mexico Supreme Court was free to determine that its previous holding affirming Earnest's conviction on remand from this

Court in *Earnest* III was erroneous in light of *Crawford*. That is precisely what happened in the court below when it concluded:

> In *Crawford*, therefore, the United States Supreme Court confirmed what the New Mexico Supreme Court announced in *Earnest I*--that a custodial statement by an alleged accomplice to a police officer is not admissible unless the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant. Because Earnest did not have the opportunity to cross-examine Boeglin, the tape recording and transcript of his statement were inadmissible under our reading of United States Supreme Court precedent that existed at the time of *Earnest I*, which *Crawford* clarifies has always been a correct interpretation of the law.

119 P.3d at 148.

Second, the reasoning of the New Mexico Supreme Court does not really lead to an inference of conflict with the decision in *Brown v. Uphoff* warranting review by this Court. The disposition in *Earnest* was expressly limited by the state court to the *unique* facts of the case. 119 P.3d at 149 (phrasing its holding: "Under the unique facts and procedural circumstances of this case . . . ") The court did not hold as a general rule that *Crawford* is to be applied retroactively to other New Mexico defendants, as even the dissenting justice conceded:

> I recognize that the majority limits its retroactive application of Crawford to the specific facts of this case and to this one habeas petitioner.

119 P.3d at 149, Serna, J., dissenting; [Petition for Writ of Certiorari, at 12].

The State's argument, predicated on the express language of its question presented for review, does not demonstrate that a certworthy claim. Even if the court's rationale was incorrect in its characterization of *Crawford* as essentially correcting an error and re-establishing the viability of the controlling constitutional rule at the time of Earnest's trial rather than announcing a "new" rule, the state court has not announced a rule so contrary to the holdings of this Court, or so in conflict with the holding of the Tenth Circuit in *Brown v. Uphoff*, as to warrant review. The policy considerations underlying deferential treatment of state court dispositions in federal habeas, comity and finality, simply are not implicated by the very limited holding of the New Mexico Supreme Court in *Earnest*.

IV.

The petition should be denied because the limited decision rendered by the state supreme court does not demonstrate a compelling reason for the exercise of this Court's jurisdiction.

Finally, Earnest submits that this Court's exercise of its jurisdiction by writ of certiorari should not only be informed by questions of legal interpretation, but by the context in which the court below resolved the claim he raised in state habeas corpus. The State pleads for *finality* in its petition, [Petitioner for Writ of Certiorari, at 17], but the state supreme court, the entity arguably most likely to zealously seek finality to protect its judicial and criminal justice systems, rejected that consideration in favor of granting relief on Earnest's petition.

The relief sought by the State, in contrast, would ensure that Earnest remain incarcerated on a conviction that *Crawford* now demonstrates was improperly obtained. Earnest was not tried subsequent to any decision of this Court holding that a non-testifying accomplice's confession was contemplated as consistent with the protections of the Confrontation Clause. Instead, as the state court held, at the time of his trial and the direct appeal, the Sixth Amendment, as interpreted and applied by this Court in *Douglas v. Alabama*, excluded such a statement in the absence of some opportunity for meaningful cross-examination.

Moreover, the state supreme court has not ordered Earnest released, but instead, remanded the cause for new trial. The court denied the State's motions to stay and recall the mandate unanimously and the State has indicated its intent to retry Earnest. If, in fact, it can do so at this point in time, it has suffered no prejudice from the supreme court's ruling. On the other hand, if the prosecution cannot offer live, in-court testimony affording Earnest the opportunity for cross-examination, then the clear meaning of *Douglas* and *Crawford* is that it must offer sufficient evidence other than Boeglin's confession to police.

The State, in its petition to this Court, argues that Earnest should remain confined on a conviction that *Crawford* unequivocally demonstrates was obtained in violation of his right to confrontation. It asks this Court to so on the unsupported claim that the Supremacy Clause denies to state courts the right to formulate and apply their own doctrines of retroactivity pursuant to state law and tradition. And it does so by asking this Court to reject the state court's exercise of judicial discretion to achieve justice:

> Our decision is limited to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has now been vindicated, which entitles him now to the same new trial he should have received back then.

119 P.3d at 148-49.

CONCLUSION AND PRAYER FOR RELIEF

Based on the foregoing argument, Real Party in Interest Earnest moves the Court deny the petition for writ of certiorari to review the judgment of the New Mexico Supreme Court.

Respectfully submitted this 17th day of February, 2006.

J. THOMAS SULLIVAN
ATTORNEY AT LAW
COUNSEL FOR REAL PARTY IN INTEREST, RALPH RODNEY EARNEST
P.O. BOX 17007
LITTLE ROCK, ARKANSAS 72222
501/324-9940